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JOHN T. FEY, Clerk

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1956

No. 691

MARY EDITH DAULTON, Administratrix of the Estate of Donald LeRoy Daulton, deceased,

Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

Petitioner Mary Edith Daulton, Administratrix of the Estate of Donald LeRoy Daulton, deceased, prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals, reported in 217 Fed. 2d 710, appended hereto as Appendix "A", together with the certified record.

JURISDICTION.

The judgment of the United States Court of Appeals was made and entered on October 15, 1956. There was no petition or order for rehearing and there was no order granting an extension of time within which to petition for certiorari. The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari are 28 U.S.C. 2101 and 28 U.S.C. 2106; and Rule 19.1 (b) Rules of the Supreme Court.

QUESTIONS PRESENTED FOR REVIEW.

Did the trial judge prevent the plaintiff from having a fair trail, and violate the "due process" provision of the Fifth Amendment to the United States Constitution, when he arbitrarily refused plaintiff's counsel the right to present to the jury, by argument, the law applicable to the facts that would support the contentions of the plaintiff?

Does a trial judge violate the provisions of the Fifth Amendment to the Constitution when he deprives the plaintiff of the benefit of testimony of an expert witness by distorting and discrediting that testimony?

Does a plaintiff have a fair trial and the full benefit of the "due process" provision of the Fifth Amendment to the Constitution of the United States, when counsel is arbitrarily forced to either erroneously state the law or not state it at all?

Did the rulings of the trial judge deprive the plaintiff of her right to have her case and cause fully and effectively presented by counsel, in violation of the "due process" provision of the Fifth Amendment to the United States Constitution?

STATUTES INVOLVED.

This case involves the Fifth Amendment to the Constitution of the United States.

> "No person shall . . . be deprived of life, liberty, or property without due process of law; . . ."
> *Constitution, U.S.C.*

STATEMENT OF THE CASE.

This action was filed in the United States District Court for the District of Oregon, under the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. 51 et seq. to recover damages for the death of Donald LeRoy Daulton, allegedly caused by the negligence of the defendant.

The deceased, while engaged in his work as a brakeman on the 6th day of October, 1952, suffered injuries which caused his death, under the following circumstances.

The deceased was engaged in his work on a work train at a point about one mile south of Wocus, Oregon (P.R. 46).[1] The train was moving north toward

[1]Refers to printed record page.

Wocus for the purpose of proceeding into a siding (P.R. 47). There were welders working alongside of the track that the train would have to pass (P.R. 46). The deceased had the duty of aligning the switch so the train could enter the siding (P.R. 48). He was on the right front footboard of the engine as the train moved toward the switch. The conductor or engineer was in charge of telling the men where to ride (P.R. 51). When the train was about forty car lengths from the switch deceased went out of the sight of the engineer (P.R. 116). All witnesses except the engineer and the superintendent of the Southern Pacific testified that according to custom and practice the train should have been stopped immediately when deceased went out of view of the engineer, but the move continued until the train was stopped one or two car lengths south from the switch (P.R. 124). Deceased was found under the front trucks of the engine tender (P.R. 49), and his personal effects and marks of being dragged extended south approximately one hundred feet (P.R. 49). The train could have been stopped in from ten to fifteen feet (P.R. 51).

There were no witnesses to what actually happened on the front end of the engine.

REASONS FOR ALLOWANCE OF WRIT.

Counsel for plaintiff, before argument to the jury, asked the trial judge if it would be permissible to refer to instructions that might be given so as to conform the facts to the law so that an intelligent

presentation could be made showing that the plaintiff under the law as applied to the facts should be entitled to a recovery. The Court not only refused such permission but denied counsel any right to argue the law.

"Mr. Brobst. There was one other point, and that is this: In argument sometimes I like to refer to the instructions that will be given, and ask the jury to listen for them, to bring out and emphasize a point.

The Court. I would not suggest taking any chance on doing that here.

Mr. Brobst. I don't want to get up and say—

The Court. Not only that, *but I have a personal custom, which all judges do not follow, and that is that I do not permit you to argue the law or to say that I am going to give an instruction,* because I think that gives undue emphasis to the particular point that is being brought out, and the other side can get up and say that I am going to say just absolutely the contrary. I might give something in between. As a matter of fact I usually don't know what I am going to say to a jury——

Mr. Brobst: I am confronted with that problem myself when I get up to argue sometimes. This other point: I may explain the Act to them, the way it operates, that he was not covered by State compensation, and that the only recovery is under this Act?

The Court. You will have to leave that to me." (P.R. 114, 115).

After these remarks by the Judge, counsel stated that the Court was taking away all of his argument.

"Mr. Brobst. That is what I want to know. You are taking (86) all my arguments away from me." (P.R. 115).

Denying counsel the right to present the facts to the jury in the light of the applicable law, is contrary to the law.

"In the trial of cases to a jury in the federal courts, the arguments of counsel must be confined to the issues of the case, *the applicable law,* (emphasis added) the pertinent evidence, and such legitimate inferences as may properly be drawn therefrom."

London Guarantee & Accident Co. v. Woelfle, 83 Fed. 2d 325;

Chicago & N.W. Ry. Co. v. Kelly, 84 Fed. 2d 569.

"Nor is there any merit in the contention that counsel for plaintiff was permitted to make improper argument to the jury when after discussing some of the evidence he said: 'I think the Court will instruct you as to the law.' Objection was then made, and the argument is that counsel should not be permitted to tell the jury what the Court would instruct them as to the law. It is entirely proper for counsel to say in his argument that he thinks the Court will instruct the jury—stating the law which he thinks the Court will give."

Nuins v. Mutual Ben. Health Co. Accident Assn. 319 Ill. App. 239, 48 N.E. 2d 796.

"Although an attorney in his argument to the jury may state the principles of law applicable

to the action so far as it is necessary to enable him to discuss the evidence intelligently . . ."

Mokina v. Spokane, P. & S. Ry. Co., 155 Ore. 317, 63 Pac. 2d 1082, 1089.

"That counsel may in his argument, state what the law is and apply the law to the facts in the case is well established in California, provided of course, the statement of what he considers to be the law is correct."

People v. Dykes, 107 Cal. App. 107, 118;

De Armos v. Dickerman, 108 Cal. App. 2d 548, 239 Pac. 2d 65.

"Counsel have the right to argue 'the whole case as well of law as of fact' G.S. Sec. 84-14; Howard v. Western Union Telegraph Co., 170 N.C. 495, 87 S.E. 313. Frequently it is necessary for them to do so in order to present, in an intelligent manner, the facts they contend the jury should find from the evidence offered. Sears Roebuck & Co. v. Rouse Banking Co., 191 N.C. 500, 132 S.E. 468."

Brown v. Vesbal, 55 S.E. 2d 797.

See, also

Belkley v. Thompson, 211 S.W. 2d 83.

In north Carolina the right to argue the law and the facts is a statutory one.

". . . in jury trials the whole case as well of law as of fact may be argued to the jury."

Conn. v. Seaboard Airline R. Co., 201 N.C. 157, 159 S.E. 331.

The rule is well stated in Abbott's Jury Trials, Fifth Ed. p. 769, Sec. 352, Subd. h:

> "Counsel has the right to state his views of the law to the jury by way of argument of the question of fact to be submitted to them . . ."

And

> "It is elementary law that counsel in argument may comment on the instructions."
> *Rhomberg v. Israel,* 296 S.W. 860.

The witness, Zimmerman, was called by the plaintiff to testify to the stopping distance of a train composed of the same type of cars as the train involved in the accident. He was a switchman employed by the defendant and had been so employed for eighteen years.

> "Q. Mr. Zimmerman, what is your business or occupation, please?
> A. I am a switchman for the Southern Pacific Company.
> Q. How long have you been employed by the Southern Pacific Company?
> A. Eighteen years." (P.R. page 75).

He had been a helper on switch crews and he had been an engine foreman and had worked two months as a brakeman.

> "Q. What types of work have you done generally?
> A. Helper on switch crews and engine foreman, and two months as brakeman." (P.R. page 77).

After this qualification he was asked in what distance the movement of an engine, two K and J cars, a ditcher, and a caboose traveling at two to four miles an hour could have stopped (P.R. page 77).

The Court sustained an objection and stated:

> "I think that is correct. I don't think he has had any experience to qualify him to answer." (P.R. 78).

The same general question was again asked (P.R. page 78) and over objection the Court permitted him to answer but, in so doing, completely discredited his answer by the following statement:

> "He has worked around trains. It is a question for the jury. Ladies and Gentlemen of the jury, I think that this witness has shown no particular qualifications, anymore than you or I would have about this, but he has seen trains in operation, perhaps . . ." (P.R. page 78).

There is no question but what he was far better qualified than the jurors who were ordinary laymen.

See:

Peters v. Southern Pacific Co., 160 Cal. 48, 116 Pac. 400;

Newkirk v. Los Angeles, 21 Cal. 2d 308, 131 Pac. 2d 535.

In the above cases the Court clearly states that the management and operation of trains is a matter out-

side the experience and knowledge of ordinary jurors. This witness was amply qualified as an expert.

Weinsatts, Adm. v. L. & N., 31 S.W. 2d 734;
Chicago Great Western v. Beecher, 150 Fed. 2d 394;
Byrd v. Va. Railroad, 13 S.E. 2d 273.

It has been held prejudicial error to distort and discredit the testimony of a witness as the Trial Court did here.

> "As we stated in *Quercia v. United States,* 289 U.S. 466, 469, 53 Supreme Court 698, 699, 77 L. Ed. 1321:
>
> 'This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it.'"
>
> *Cal-Bay Corp. v. United States,* 169 Fed. 2d 15, 21.

After the trial judge had rejected all requested instructions the question of measure of damages was discussed, and although that question evidently was never reached by the jury, this discussion shows clearly the arbitrary position taken by the trial Court, in the Court's erroneous view of the measure of damages. That view restricted counsel in his argument, and although consented to by the defendant, it denied

counsel for plaintiff the right to correctly argue damages.

(See Appendix "B" for discussion.)

Counsel was attempting to have the Court instruct the jury in accordance with the law established by this Court that:

> "The true measure of recovery is the present cash value of future benefits of which the beneficiaries were deprived by the death, making adequate allowance according to the circumstances for the earning power of money."
>
> *Chesapeake R.R. v. Kelly*, 241 U.S. 495, 60 L. Ed. 1117.

That is the proper measure of damages under the Federal Employers' Liability Act, 45 U.S.C. 51 et seq.

The Court stated that no instruction would be given on the present cash value of future benefits, or the earning power of money, and thus counsel was either to argue erroneously or not at all.

If counsel and Court cannot be guided by the decisions of the United States Supreme Court, then what can be the guide? The trial Court in taking this arbitrary stand stated:

> "If the Supreme Court doesn't like my comments on this thing, I would be very glad if they would reverse it." (P.R. p. 155, see Appendix "B".)

Certainly the trial judge by erroneously taking away argument of counsel, denied to plaintiff the right to be fully heard and effectively represented by coun-

sel, a direct violation of the constitutional right of the plaintiff under the "due process of law" provision of the Fifth Amendment to the United States Constitution.

In any case, civil or criminal, the right of a party to be represented by counsel is unquestioned.

> "In civil cases as well as in criminal cases, the right of a party to be represented by counsel before the court upon the law and before the jury as to facts at all stages of the trial is not to be questioned."
>
> 53 *Amer. Juris.* 43 Sec. 25.

See, also,

Powell v. Alabama, (infra).

This right to be represented by counsel means effective representation, otherwise there is a denial of "due process of law."

> ". . . under the Sixth Amendment and the due process clause of the Fifth Amendment the assistance of counsel means effective assistance." *Neufield v. United States,* 118 Fed. 2d 375.

And, under comparable circumstances, where the trial Court refused to hear argument of counsel, as compared to the facts here where the trial judge erroneously prevented argument to the jury, it was held that effective assistance of counsel was forbidden.

> ". . . *in the denial of the right to argue the case* (italics added) there being no written briefs below, were forbidden the effective assistance of counsel."
>
> *Thomas v. District of Columbia,* 90 Fed. 2d 424.

The attitude of the trial judge constitutes a refusal to hear the plaintiff by counsel, as his argument had been taken away by the erroneous ruling of the Court, and this constituted a denial of "due process".

> "The arbitrary refusal of any court, state or federal, to hear a party by counsel employed by and appearing for him would be a denial of a hearing and in a constitutional sense a denial of due process."
>
> 53 *Amer. Juris.* 43 Sec. 25.

> "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore of due process in the constitutional sense."
>
> *Powell v. Alabama,* 287 U.S. 45, 77 L. Ed. 78, 53 Sup. Ct. 55, 84 A.L.R. 527;
>
> *Roberts v. Anderson,* 66 Fed. 2d 874 at 877.

The plaintiff could not be and was not fully represented by counsel, as was his right, because of the limitations placed upon counsel by the erroneous attitude of the trial judge. This right cannot be unduly impinged.

> "While a party has a constitutional right to be represented by counsel, and that right cannot be unduly impinged . . ."
>
> *Loreno v. Ross,* 133 So. 251, 222 Ala. 567.

To be fully represented is an integral part of "due process."

> ". . . It must be kept in mind by those who preside over our Courts that just as in criminal

> cases it is the constitutional right of every accused 'to be heard by himself and counsel', so likewise in civil cases, a litigant's right to be fully represented by counsel is an integral part of that 'due process of law' which every resident of this state and nation whose legal rights are being adjudicated can freely invoke."
>
> *Nestor v. George,* 46 A. 2d 469 at 473 (Penn.).

By the erroneous rulings of the trial judge plaintiff was denied the right to be effectively represented by counsel. Counsel's lips were sealed as far as adequately and intelligently presenting his client's case to the jury, thus depriving plaintiff of a full representation and a fair trial and hearing.

It is submitted that the writ of this Court should issue to review the decision below, for it is contrary to the fundamental law of the land entitling a litigant to full and effective representation by counsel, in accordance with the constitutional right of "due process of law", and this right should not be impinged or denied by the arbitrary and erroneous rulings of the trial Court.

Dated, Oakland, California,
January 10, 1957.

CLIFTON HILDEBRAND,
Attorney for Petitioner.

D. W. BROBST,
Of Counsel.

(Appendices A and B Follow.)

Appendix A

United States Court of Appeals
For the Ninth Circuit

MARY EDITH DAULTON, Administratrix of the Estate of Donald LeRoy Daulton, deceased, *Petitioner,* vs. SOUTHERN PACIFIC COMPANY, a corporation, *Respondent.*	No. 14,924 Oct. 15, 1956

Appeal from the United States District Court
for the District of Oregon

Before: MATHEWS, BONE and CHAMBERS, Circuit Judges. CHAMBERS, Circuit Judge:

Donald LeRoy Daulton, a Southern Pacific brakeman of the Shasta division of the company, was killed on October 6, 1952, in the course of his employment near the Wocus siding, which is located about three miles from Klamath Falls, Oregon.

In the moments immediately preceding his death he was acting as the "head" or "front end" brakeman on a five car work train. The train was moving northerly on a main line track to get on a siding and

out of the way of two freight trains that were scheduled to pass each other at Wocus. As the train moved slowly forward at perhaps four miles an hour Daulton was standing on the right hand footboard (engineer's side).[1] Before entering the siding, the train was to stop for Daulton to manually throw the switch to permit entry into the siding.

Obviously, from the testimony of various trainmen, it would have been better practice for Daulton to have ridden in the cab of the engine, but on the other hand, he may have been riding the footboard to watch for tools possibly left on the track by workers and to warn the workers, as he saw them, about the other trains which would be along soon.

There were no eye witnesses. No one knows positively what caused Daulton to fall off the footboard and to be dragged between the rails and killed. It is not suggested that it was due to a sudden lurch forward or a quick stop of the engine. As the train moved forward, Daulton was at first visible to the engineer. Then he did not observe Daulton out on the footboard for a distance of "about 40 car lengths" or about 1,400 feet. Being almost at the juncture to the sidetrack, and seeing the switch for the sidetrack receiving no attention and that the block signal near the switch had not changed over, the engineer stopped the train. Now, at this point, all of the train crew

[1]In lay par lance, the front end of the engine had sort of a single step in either side of the "cow catcher," called the right hand and left hand footboards. These are for a brakeman to stand on when necessary or convenient for him to do so, particularly in connection with switching.

knew something was wrong. The testimony indicates the train probably could have been stopped within ten feet. It is not clear whether the engineer lost sight of Daulton because he, the engineer, was primarily watching a signal or because Daulton was no longer on the footboard to be seen, but somewhere under the engine or tender. At least for much of the way, the jury could have found that Daulton could not have been seen on the footboard—because he wasn't there.

Daulton's administratrix on two theories brought her action against Southern Pacific for his death. The first theory was under the so-called Boiler Act[2] and claimed that the death was due to a protruding bolt on the right hand footboard which had not been countersunk, as good practice would require. In such an event contributory negligence of the decedent would not have been a defense or result in any diminution of damages.

The other claim was under the Federal Employers Liability Act.[3] This claim asserted negligent operation of the train caused the death. Absence of negligence by the defendant and sole neligence and contributory negligence of the decedent were pleaded by Southern Pacific. During the trial a pre-trial order was completed, setting forth the contentions of the parties. It concluded with defining the issues as follows:

---

[2]See 45 U.S.C.A. § 23, et seq.

[3]See 45 U.S.C.A. § 51, et seq.

"I.

"Was defendant's engine improper or unsafe in any of the particulars charged and, if so, was such a proximate cause of the death of the deceased?

II.

"Was the defendant guilty of negligence in any particular as charged and, if so, was such a proximate cause of the death of the deceased?

III.

"What is the amount of plaintiff's damage?"

The case was tried to a jury. In view of the usual verdict returned for the plaintiff in cases of this type, it is surprising that the jury in this case did return a verdict for the railroad company. But it did. Now the plaintiff appeals.

The plaintiff-appellant attacks in several ways the instructions given on contributory negligence. In proper time, the instructions on this subject were excepted to by the plaintiff's counsel in words as follows:

"There is only one, your Honor. That was the question of the instruction on contributory negligence. I believe under the circumstances, where the law conclusively presumes that the plaintiff was in the exercise of ordinary care, there being no evidence in the record to the contrary or that he did any act that could be construed as an act of contributory negligence, the instruction should not have been given."

Here both sides were represented by lawyers, experts in the field. It is particularly just[4] to apply Rule 51 of the Federal Rules of Procedure here and to hold that the only objection this court can consider in appellant's group of objections concerning contributory negligence is the one which asserts it was not appropriate to instruct the jury in the field at all because "the law conclusively presumes that the plaintiff was in the exercise of ordinary care, there being no evidence in the record to the contrary or that he did any act that could be construed as an act of contributory negligence."

Southern Pacific answers that the objection is of no moment anyway because a verdict by the jury in its favor necessarily means the company was guilty of no negligence; therefore, it matters not a whit whether any instruction was given on the subject or what the instruction said. That is, to say, in Federal Employers Liability cases contributory negligence mitigates damages by a certain percentage or fraction. If the defendant caused none of the damage, there is no legal damage. The reduction of nothing by a fraction is nothing. Therefore, error, if any, was harmless. So the argument goes.

However, a better ground to dispose of the point is to say that the objection as made and when made was not a good one. Of course, one starts with the presumption, in the absence of evidence, that every-

[4]The objections now made by appellant, but not discussed in this opinion, the court deems to be without merit.

one was careful. But the presumption is not conclusive.

The rules in these Boiler Act and Federal Employers Liability cases are extremely liberal. Tennant v. Peoria & Pekin Union R. Co., 321 U.S. 29. Usually the jury must decide. Here is a string of circumstances, no direct proof. Certainly one cannot say that there is strong proof pointing to any one solution as to how the death occurred. But there are several possible sequences to choose from that might have placed the blame upon the railroad. The jury was entitled to search for what to it seemed most probable as it reconstructed what happened. It could find the engineer on the train, and thus the company, to blame and liable, but it did not have to do so.

Surely the company on contributory negligence is entitled to have the same rules work in its favor. After exploring the testimony for an hypothesis to support plaintiff, and finding none, of course, nothing further was required. But suppose the jury had concluded that the engineer did not cause Daulton to fall off under the train, that Daulton probably did receive serious injuries when he fell off and under (but perhaps not fatal). Further, assume that the jury might find the railroad was negligent in not getting the train stopped, eliminating the distance he was dragged, and thus saving the life of Daulton. Then, this court would see no objection to a jury concluding that it must have been negligent riding by Daulton that got him under the engine in the first place. The jury could then say,

for example, the fault was one half Daulton's, and thus reduce the verdict by one half.

The lesson seems to be in Schultz v. Pennsylvania Roalroad Co., 350 U.S. 523, that the jury can choose any reasonable hypothesis and that the rule works both ways.

There are other assignments of error too. One of the major objections of the appellant is that the court in advance advised counsel that they couldn't predict to the jury what the instructions on the law would be. In common parlance, neither side was permitted "to argue the law" to the jury. But the great question here was what caused the accident. And how much were the damages. On a fair consideration of the record, it would not appear that the plaintiff was required to argue in a vacuum. It would appear that the trial court committed no error on this point.

On another point claimed as error, the record is against the plaintiff. At the threshold, the attorneys for the plaintiff seem to have made an error. It was an honest one. The right footboard on the engine when examined sometime the next day had the head of a bolt sticking up on the surface. It was not countersunk as it should have been. And this condition seems to have continued for months after the accident. Counsel for the administratrix arranged that the bolt extending up above the surface of the board was duly photographed. Upon this discovered condition, which misled them, they projected the claim that a piece of defective equipment caused the accident. If true, and

assuming causation, absolute liability under the Boiler Act would have resulted. But although the issue built upon this bolt did go to the jury, the railroad at the trial explained, and it is fair to say rather conclusively, that the morning after the accident the old footboard was removed after railroad representatives photographed it and before the plaintiff had seen it. The board was stored for possible future need as evidence in this, the case one could expect almost surely would be filed. Appellant claims that the circumstances of incidents in the case before trial were such that they were misled by the Southern Pacific on this footboard and that the company should have told her counsel in advance.

The point in this record might have some merit if it did not also appear that in the opening statement to the jury made by the defendant it was stated that the railroad would show that the footboard was changed immediately after the accident and that nothing was wrong with the board at the time the accident happened. Plaintiff made no request for a continuance at the time and did not complain. Under the particular circumstances here, all that plaintiff might have been entitled to was time. For this, no request was made. Complaint cannot be made now.

Finally, appellant says the court made prejudicial remarks to the jury concerning the testimony of a witness named Zimmerman when he gave his expert opinion as to the time required to stop the work train going at the slow speed which all admitted. It

is a close question whether the comment should or should not have been made at the time it was. But by the end of the case several witnesses were asked their opinions as to the distance required to stop the train. All fixed a very short distance. None suggested over fifteen feet.[5] Had the issue remained hotly contested as to the distance required to stop, then the comment might have to be seriously considered. But when the case was submitted to the jury, the comment had become of no consequence anyway.

Plaintiff had a fair trial.

Affirmed.

(Endorsed:) Opinion. Filed Oct. 15, 1956.
Paul P. O'Brien, Clerk.

[5]Zimmerman said "within a few feet, almost immediately." Others said (1) within 10 to 15 feet (2) in between four to six feet (3) six to eight feet.

United States Court of Appeals
For the Ninth Circuit

Mary Edith Daulton, Administratrix of the Estate of Donald LeRoy Daulton, deceased, *Appellant,* vs. Southern Pacific Company, a corporation, *Appellee.*	No. 14,924

JUDGMENT.

APPEAL from the United States District Court for the District of Oregon.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed, with costs in favor of the Appellee, and against the Appellant.

IT IS FURTHRER ORDERED and adjudged by this Court, that the Appellee recover against the Appellant for its costs herein expended and have execution therefor.

Filed and entered October 15, 1956.

Appendix B

"The Court. I don't find any difficulty with that. Now, then, as to this measure of damages, I think that I won't give any instruction with reference to the value of money because I think that is asking me to comment on the evidence.

Mr. Brobst. Yes. I wasn't the value of money——

The Court. The earning power of money. According to your Instruction 25, according to the circumstances, they (129) could make an allowance for the earning power of money.

Mr. Brobst. That is based on the actuarial table. Your Honor, the statute says that you are entitled only to the present cash value of the loss of future earnings. I think that is the requirement, and it is not a question of——

The Court. Just a moment. Do you agree to that?

Mr. Gearin. I don't recall the statute, your Honor.

The Court. Have we got the statute here?

Mr. Brobst. I have it in my hotel room. Here is my idea on that: I know the cases hold in death cases if you recover without your actuarial figures being in it will be reversed because that is not the true test of damages. They must make an allowance for the earning power of money, because it would be too high. I mean it is giving the defendant a break, because you invest your lump sum at a 3 per cent interest rate and it cuts down the lump sum to give this widow what she would anticipate per month——

The Court. It seems to me it enters into the field of speculation. What is your suggestion?

Mr. Gearin. Your Honor, I am trying to recall the instruction which your Honor has given in other cases under the F.E.L.A. My impression is that the instruction which your Honor has given, and to which I have never taken exception, is the loss of pecuniary benefits.

Mr. Brobst. It is the present cash value, I think, is (130) the test. We have run into that in other cases which we have had to retry because of it. It works to the benefit of the defendant, because it cuts down.

The Court. That is what I am trying to get at here. I think it is a minor and immaterial instruction myself because of the fact that I don't think the jury pays a bit of attention to that sort of an instruction. But in order to avoid error I would be pleased if counsel would indicate an instruction that they could agree on.

Mr. Brobst. Your Honor, I think the Guthrie case and that other United States Supreme Court case that I cited in my trial brief states the rule pretty thoroughly, and it is one that we have followed ever since that Guthrie decision in San Francisco.

The Court. Yes, but the Guthrie case has a lot of implications besides that. The Guthrie case didn't arise in this sort of action.

Mr. Gearin. The measure of recovery is the pecuniary benefits reasonably to have been anticipated, benefits of which they have been deprived as a result of the employe's death, such damages being such pecuniary assistance or support as they might reasonably have expected to receive had the employe lived.

The Court. That clause is included in your Instruction No. 27, Plaintiff's 27. (131)

Mr. Gearin. That was my thought, percuniary benefits.

The Court. And also No. 26.

Mr. Brobst. I don't want it to bé raised afterwards that it was error because it was not the present cash value. That is the thing——

Mr. Gearin. We won't raise that question, your Honor.

Mr. Brobst. That is the thing that concerns me most.

Mr. Gearin. I assure you we won't raise that in this court or any other court.

The Court. With the consent of the defendant, the Court will refuse to give Plaintiff's Instruction 25.

Mr. Gearin. I don't know whether the record is complete. We agree to the withdrawal of the request. We will raise no point on the Court's failure to give it.

The Court. I will make it with the consent of the defendant in that regard. I have the consent of the defendant, so I won't ask for the consent of the plaintiff.

Mr. Brobst. Here is the case. It says: 'The true measure of recovery is the present cash value of future benefits of which the beneficiaries were deprived by the death, making adequate allowance according to the circumstances for the earning power of money,' citing Chesapeake Railroad v. Kelley, 241 U.S. 495.

The Court. I don't think that is anything the Supreme Court has the power to control me on,

whether I give an instruction (132) in that regard or not. I think myself it is a comment on the evidence. If the Supreme Court wants to take a different view of it, that is all right, but I think it is a comment on the evidence. I think what they have to consider is adequate compensation for the injury. I think they can take into consideration the earning power of money, and so forth and so on, but I don't think I have to tell them they are going to.

Mr. Brobst. Here was the thing, your Honor, that concerned me about it. The Supreme Court said: 'So far as a verdict is based upon the deprivation of future benefits, it will afford more than compensation if it be made up by aggregating the benefits without taking account of the earning power of the money that is presently to be awarded. It is self-evident that a given sum of money in hand is worth more than a like sum of money payable in the future.' That was the thing that I was afraid of. It raises a question in my mind. Of course, if they waive the error, I don't mind, actually, because the plaintiff has a better break——

Mr. Gearin. Don't worry about me.

The Court. As a matter of fact, I have sat long enough on the Federal Court so that if I thought it was more than adequate I would set it aside.

Mr. Brobst. That is right.

The Court. But if I am satisfied with it, then I am perfectly willing to let the Supreme Court say I was wrong in not giving the instruction. But the defendant has waived that, so I don't see any danger

in it anyhow. Besides, I think it gives them a problem that they are not equipped to handle. That is my notion about it. If I tell the jury what the present value of money means, they are not going to pay any attention to that. If the Supreme Court doesn't like my comments on this thing, I would be very glad if they would reverse it. The thing is chiefly whether I am satisfied with the verdict."